

Indicators of incapacity are detailed in Table 1. The capacity to enter a contract typically requires the presence of all these factors, whereas the capacity to execute a will requires primarily long-term memory and a connection to reality.

**Table 1: Indicators of Incapacity**

Factors	Meaning	Questions the Planner Needs to Consider
Alertness	How awake, drowsy, or able to follow a conversation someone is.	Does the person fall asleep when you are talking with them?
Attention	The ability to concentrate for a period of time.	Does the person maintain eye contact, say relevant things, and appear to be thinking clearly?
Orientation	A person's awareness of their own identity, who other people are, where he or she is at a given moment, and what day and time it is.	Does the person know where he or she is, the year, who you are, and why he or she is seeing you?
Short-term memory	Ability to recall recent events, such as why he or she came to see you, and communicate his or her wishes.	Does the client ask the same question or tell the same story repeatedly? Does the client remember what they ate during the day?
Long-term memory	Able to remember life events, the nature and extent of his or her estate, and their loved ones.	Can the client tell you about his or her life, career, children, homes, and property?
Connected to reality	Not experiencing delusions or anxiety attacks. Not hallucinatory. Able to distinguish reasonable from unreasonable beliefs and expectations.	Does the client suffer from unreasonable fears, such as the belief a loved one is stealing from them, or make delusional statements, such as a deceased person is still alive? Is the client guarded or suspicious? Does the client make grandiose statements or make impractical requests?
Mood and affect	The client's emotions, such as happiness, sadness, depression, fear, and anger, and the visible presentation of the emotion. For example, seeing a loved one usually produces a happy response that is visible to others.	Are the client's emotions consistent with the situation or the topic being discussed? Are the emotions subdued or exaggerated? Are the decisions being made generated by fear, elation, or other moods that appear inappropriate?
Comprehension	The person "gets" what is going on, understands the nature of the decisions and actions being taken, and communicates that understanding through appropriate questions and observations.	Can the client explain his or her purpose coherently without significant prompting? Does the client have an explanation or rationale for his or her decisions?

What is the procedure for making this transfer of decision-making authority? Usually loved ones, physicians, or a combination of the two make the decision, but the estate planning documents may require a disability panel or court. There are pros and cons to each (see Table 2). It is important for the procedure for transferring this responsibility to be consistent between the documents because the client and family want an integrated continuation of the client's financial management, medical care, and payment of expenses and debts.

**Table 2: Procedures for Transferring Decision-Making Authority**

Procedure	Level of Difficulty	Pros and Cons
Loved one	Easy	May be too easy. No objective standard.
Attending physician	Easy	Often the standard in emergency situations. Loved ones may have more awareness of normalcy than a physician.
Loved one and attending physician	Relatively easy	Many consider this the right balance with regard to convenience, subjectivity, and objectivity, but some are concerned that loved ones with ulterior motives can sway a physician.
Two licensed physicians	Moderate	More conservative than one physician. May be difficult to get a second opinion in critical situations. Some specify two independent physicians or require three physicians.
Disability panel	More difficult	Can include loved ones and physicians on the panel. May take time to convene the panel and reach a determination.
Court	Difficult	Most conservative, but requires hiring an attorney, obtaining affidavits, petitioning the court, and waiting for a hearing.
Absence	Special circumstances	Decision-making authority is transferred if the client disappears or is kidnapped, held hostage, detained in jail, or held in prison. Generally a person must be missing for seven years to be declared dead.